

TOWARD A CIVIL DISCOURSE

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After French political scientist Alexis de Tocqueville's trip through the United States in the early half of the nineteenth century, he remarked favorably on Americans' exceptional practice of coming together in voluntary associations to solve problems requiring concerted collective action.¹ He observed that while working in such associations, "[s]entiments and ideas are renewed, the heart grows larger and the human mind develops."² It was this uniquely American spirit that formed our governmental institutions, created our laws, and solidified faith in our governance system.

Throughout the course of the great American Experiment that is our democracy, working collaboratively and civilly exchanging ideas on issues of deep divide has often been challenging but perhaps no more so than today. At a time when collaborative focus is imperative for managing issues concerning health care, immigration, access to justice, individual rights, and other critical subjects, many have lost the ability or the inclination to listen to unpopular views and engage in civil discourse. Rather than "talking to" others, we have become adept at "talking at" others, often using social media to enlarge and enflame our audience, which has only widened, not closed, the divide on how best to advance solutions to these issues.

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1. *See, e.g.*, 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 895 note a (Eduardo Nolla, ed., James T. Schleifer, trans., Liberty Fund 2012) (1835).

2. *Id.* at 900.

Perhaps partially as a result of the divisions crisscrossing our nation, people's faith in our governmental institutions has withered as members of one political party or the other assumes leadership positions with established agendas. According to a 2020 Pew Research Center poll of about 13,000 U.S. adults, only 20% said they trusted the federal government to "do the right thing" almost always or most of the time.³ As faith in our institutions diminishes, we risk adherence to the rule of law and democracy itself. Thus, it is incumbent on those who have devoted their careers to upholding the rule of law and promoting equal justice to work towards shoring up faith in our institutions even as we disagree on how they should operate and what improvements are needed. If we fail in that endeavor, nothing will remain to improve.

This special issue of *The Journal of Appellate Practice and Process* addresses the current divisions in the law and in our society and explores what courts, judges, and lawyers can do to mitigate the rhetoric and tilt society towards positive action. It could not be timelier. Fifteen authors invite us to reexamine our history, posit ways for us to engage our communities, and offer pathways for the legal profession and the judiciary to step into the fray and help solve issues plaguing our nation.

Kenneth Morris, who is descended from both Frederick Douglass and Booker T. Washington, sets the stage by describing his ancestors' struggle for freedom juxtaposed with their undying hope in this country's founding ideals. He urges us to let history guide us in increasing understanding of and promoting public confidence in the integrity of our justice system.

Judge Joshua Wayser and Dean Erwin Chemerinsky each identify specific problems within our courts. In *An LGBTQ Perspective on the Crisis in the Justice*

3. See *American's Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RESEARCH CENTER at 4 (Sept. 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/>.

System, Judge Wayser invites us to consider the politicized state of the justice system and suggests a path forward towards reducing that politicization. Dean Chemerinsky, in *The Non-United States of America*, tackles the deep divide in our country by pointing to the United States Constitution as both a source of that divide and a solution for closing it.

Several authors argue that courts and judges can do more to overcome people's waning faith in the justice system. Judge Shama Hakim Mesiwala's article, *Servants to Justice*, calls on readers to honor Dr. Martin Luther King, Jr.'s vision by unifying racial groups and assisting those historically treated poorly in courtrooms, such as Native Americans. In *Judicial Words Matter*, Justice Therese M. Stewart entreats judges to avoid using inflammatory language that serves only to denigrate groups or even judicial colleagues and portrays the judges as "taking sides" in broader political disputes. Similarly, in *Journalists, Justice, Obama Judges, and Trump Judges*, journalist Tony Mauro offers advice for interacting with the media and helping reporters to accurately report opinions. Professor Michael S. Greve, in *What Courts Can Do*, examines model visions for federal courts and urges adoption of practices that simply resolve disputes rather than declare principles of law. And in *Diné Duty of Fairness and Healing*, Chief Justice JoAnn B. Jayne shares the role of *Diné* lawyers in serving the public trust, including duties of *K'é* (Kinship; Relations) and *Hózhó* (Beauty, Harmony, Balance), as well as application of *Diné* Fundamental Law and the inseparable requirements of *Diné bi naat'áanii* (Leader), all of which are sacred facets of *Diné* justice.

A few articles urge readers to act outside their traditional roles. Building on the recent-decades trend of judges and lawyers taking charge of civics education in the wake of the education systems' emphasis on STEM subjects, Kari C. Kelso and Professor J. Clark Kelso penned *Civic Education and Civil Discourse: A Role for Courts, Judges, and Lawyers*, highlighting ways the legal profession and the judiciary can teach and model civil

discourse as a foundation for resolving disputes over today's issues. Judge Mesiwala's *Servants* article similarly urges readers to engage on civics education. And Elder Lance B. Wickman outlines in *Lawyers as Peacemakers* a way in which lawyers and judges can invoke healing traits in solving conflicts.

Two authors exemplify professional discourse on a controversial topic. In *Giving Our Better Angels a Chance: A Dialogue on Religious Liberty and Equality*, Professors Thomas C. Berg and Alan Brownstein provide a written dialogue addressing church and state issues that currently challenge our society. Although they disagree on some points, their discussion illuminates different viewpoints and avoids attacking those who hold them.

I am intrigued by the authors' observations and suggestions, although I do not entirely agree with everything written. But that is the beauty of civil discourse. I can "listen" to these authors' views, digest them, use what I wish moving forward, and discard the rest. My stance is not remarkable to any lawyer, judge, or law professor, as we are trained and live our lives this way. The authors' goal, and our common vision, is to aid greater society to do likewise. De Tocqueville's admiration of Americans as possessing unique social problem-solving skills through collective action was not misplaced in the nineteenth century. I am confident that the basis for that sentiment remains true today, even if it is sometimes frayed. It is incumbent on all of us to nurture that skill to ensure societal growth, and I am delighted that this issue takes steps in that direction.